# NOTE

# Tangled Up in *Purple*: Online Labor Organizing and the Takings Clause

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## ABSTRACT

*Across the economy, employers' widespread deployment of digital internal communications platforms—such as Slack, Microsoft Teams, and more—has radically altered the patterns of intraworkplace communication. For employers, these platforms present evolving opportunities for increasing productivity and worker engagement—but only a docile, agreeable kind of engagement. For workers and their unions, these platforms can be uniquely helpful tools in the continuing struggle for workplace democracy. As employers have repeatedly asserted their property right to regulate their workers' use of internal digital communications platforms, the National Labor Relations Board ("Board") has struggled to clearly define the proper role of these platforms under Section 7 of the National Labor Relations Act.*

*Although the Board has vacillated between different conclusions on statutory interpretation and policy judgment grounds, 2014's* Purple Communications, Inc.*—in which the Board explicitly recognized workers' right to use their employers' internal email systems for organizational purposes—constitutes the Board's most expansive definition to date of workers' rights vis-à-vis these platforms. As the Board may consider expanding that right, this Note examines*

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*the merits of a potential challenge to such an expansion—specifically, a constitutional theory that has already threatened the original rule and will no doubt threaten future iterations: that it constitutes an uncompensated taking under the Fifth Amendment. This challenge poses a serious threat to the current iteration, as well as possible future iterations, based on the scope of the conduct authorized by the rule and the lack of clarity in its exceptions. To patch this weakness, this Note proposes a simple modification that would help insulate the rule from the vagaries of takings jurisprudence. Specifically, this Note proposes that the Board, in formulating a future rule, clarify that it is not authorizing any worker conduct that would cause actual harm to employer-owned digital communications systems under relevant state property law. Modifying the rule in this way would have the effect of cutting any takings challenge at the knee because it would clarify that no interest identifiable as "property" would be affected, meaning no taking has occurred. Doing so would avoid the thornier questions awaiting the Board beyond the relevance of the Fifth Amendment's Takings Clause while causing minimal harm to the policy impact of the rule.*

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## Introduction

Labor regulation is hard. The process of formulating sound policy governing industrial relations in the rapidly evolving modern workplace is almost infinitely complex. Longstanding political dynamics continue to produce legislative stasis in the field.[1] The existing legal framework throws wrenches into any bold—or even modest—effort at reform.[2] But on top of these obstacles to legislative action, constitutional precedents are increasingly shifting under regulators' feet and threatening meaningful attempts to implement any substantive legal changes.[3] One constitutional obstacle that continues to arise is the Takings Clause.[4]

The National Labor Relations Board ("Board") made one attempt at reform via its regulatory efforts in the field of digital union organizing.[5] Workers' integration of digital internal communications ("DIC") platforms into their unionization efforts has led the Board to consider the extent to which the law should recognize and protect workers' right to use DIC platforms for such purposes.[6] The Board put forward its most expansive interpretation of that right under the National Labor Relations Act ("NLRA")[7] in its 2014 decision *Purple Communications, Inc.*[8] Under that rule, workers who already have access to their employer's email system were presumptively entitled to use such systems for purposes of union organizing during nonworking time.[9] And although the rule was overturned in 2019's *Caesars Entertainment (Rio All-Suites)*,[10]

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1 *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1540–44 (2002) (describing the political dynamics causing legislative inaction on labor regulation, such as filibustering by legislative minorities); Section of Lab. & Emp. L., Am. Bar Ass'n, The Developing Labor Law § 5.I (Jayme L. Sophir et al. eds., 2024 Update, 2025), Bloomberg Law ("The most significant development in the years since enactment of the Landrum-Griffin amendments in 1959 is that the [National Labor Relations] Act has remained essentially unchanged." (footnote omitted)).

2 *See* Estlund, *supra* note 1, at 1544–69 (discussing "Built-In Obstacles to Change and Variation" in labor regulation).

3 *See, e.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).

4 *See, e.g.*, *id.*

5 *See, e.g.*, Purple Commc'ns, Inc., 361 NLRB 1050 (2014), *overruled by*, Caesars Ent. (Rio All-Suites), 368 NLRB No. 143 (Dec. 16, 2019).

6 *See* Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. Davis L. Rev. 1091, 1105, 1110–11 (2011) (noting that the proliferation of workplace digital communications platforms "represents a substantial advance for workplace collective action, as the lower cost of communication and coordination can significantly enhance employees' ability to form and act as a group").

7 29 U.S.C. §§ 151–169.

8 361 NLRB 1050 (2014).

9 *See id.* at 1063.

10 368 NLRB No. 143, slip op. at 8 (Dec. 16, 2019).

some, including current members of the Board,[11] have expressed an interest in returning to the *Purple Communications* rule and expanding its reach to other increasingly widespread DIC platforms, such as Slack and Microsoft Teams.[12]

Concurrent with these attempts to address the evolving DIC landscape, the Supreme Court recently developed the law of regulatory takings under the Fifth Amendment as applied to access to employer property in the labor organizing context, drawing concerns from commentators about the effects these developments may have on a wide range of labor regulations.[13] *Cedar Point Nursery v. Hassid*,[14] the most recent landmark case in the Supreme Court's Fifth Amendment takings doctrine, considered regulations authorizing worker access to employer property for organizational purposes.[15] The Court found that the counterfactual existence of the employers' right to exclude workers from that access in the absence of such a regulation may be a dispositive factor in resolving whether a property right is affected for takings purposes.[16] This development heightens the risk presented by takings-based challenges to a future *Purple Communications* rule, because the original rule unnecessarily abrogated trespassory causes of action involving employers' DIC platforms—specifically, trespass to chattels.[17]

To defeat takings liability for a future rule, this Note proposes a simple clarification to the original rule's exceptions: A future *Purple Communications* rule should explicitly clarify that it does not protect or authorize any worker conduct that would work actionable harm against an employer under any state property law. Such an addition would effectively frame the issue to a reviewing court by clarifying that it does not authorize any conduct that would be otherwise actionable under relevant state property law while working minimal harm to the reach of the rule. This Note makes a narrow proposal with a specific purpose: that the Board make this tailored adjustment in a future iteration of the

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11 *See* Com. Solar Ariz., LLC, 373 NLRB No. 69, slip op. at 2 n.14 (June 14, 2024) ("Although we would be open to reconsidering *Rio All-Suites* in a future appropriate case, we decline the General Counsel's request to revisit that precedent at this time . . . .").

12 *See* General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision at 49, Garten Trucking LC, 373 NLRB No. 94 (Sep. 17, 2024) (No. 10-CA-279843) [hereinafter Gen. Couns. Garten Trucking Brief]; General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge at 18–26, Tesla, Inc., No. 03-CA-312352 (NLRB Nov. 1, 2024) [hereinafter Gen. Couns. Tesla Brief].

13 *See, e.g.*, Cynthia Estlund, *Showdown at* Cedar Point*: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 145–46; Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 196–98 (2021).

14 594 U.S. 139 (2021).

15 *See id.* at 155–56.

16 *See id.*

17 *See* Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 10 (Dec. 16, 2019).

rule to lead courts to reject takings challenges under the theory that there is no property right "taken" by the rule.

Part I reviews the landscape of constitutional property in the Takings Clause context and, based on a novel reading of *Cedar Point*, constructs an operationalized framework for identifying cognizable property interests for takings challenges of labor-access regulations. Part II provides important context about the NLRA and describes the contours of the *Purple Communications* rule as it was initially enacted and how it may be interpreted by the Board in the future. Part II then applies the takings framework to the *Purple Communications* rule and identifies the risk of takings liability that could result from this application. Part III suggests that adding a discrete clarification to a future iteration of this rule would save it from takings liability and argues that such a modification would minimally harm the intended policy outcomes of the regulation.

## I. *CEDAR POINT NURSERY V. HASSID* AND CONSTITUTIONAL PROPERTY

Recent changes in takings doctrine—most notably, the Supreme Court's landmark holding in *Cedar Point*—could spell doom for labor regulators inclined to expand workers' rights on workplace communications platforms. But a particular quirk of these developments presents a way out of the trap.

The Fifth Amendment of the Constitution states simply that "private property" shall not "be taken for public use, without just compensation."[18] The Supreme Court has derived from this clause the limitation that certain regulatory actions that impose burdens on property without transferring possession to the government qualify as "takings" and must be accompanied by "just compensation" to be valid exercises of state power.[19]

But before considering whether a taking has occurred, courts invariably face two threshold questions: (1) whether the taken property constitutes a cognizable "property" interest and (2) who gets to define the relevant interest.[20] There is a remarkable paucity of precedent on which courts can rely in resolving claims alleging a taking of a novel purported property right.[21]

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18 U.S. CONST. amend. V.

19 *See* Murr v. Wisconsin, 582 U.S. 383, 392–93 (2017).

20 *See id.* at 407 (noting that "identifying the property interest at stake" is "[s]tep one" in a takings analysis).

21 *See* James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 289–90 (2013) ("With respect to takings claims, the Supreme Court has articulated no test for identifying property. . . . A court confronted with a takings challenge involving a novel property rights claim of property rights would find little in Supreme Court takings jurisprudence to guide the way.").

Broad pronouncements by the Supreme Court suggest that this question should be answered by explicit and exclusive reference to relevant state property law—or at least the Court has claimed to limit its discretion in this way.[22] Under this approach, the identification of something as property is extraconstitutional; if the relevant state law recognizes something as property, then the Takings Clause reflexively does so.[23]

But this approach has grown more relaxed. Instead, case law suggests a flexibility whereby courts can refer broadly to the entire "bundle of sticks"—the rights to exclude, use, and dispose—that has defined property ownership since the common law.[24] Specifically, the Court has suggested that a state's recognition of a right to exclude alone makes something protected property, even where the object has "no economically realizable value to its owner."[25]

Several cases have suggested that tort liability operates as a key metric in assessing whether the relevant state law recognizes a right to exclude.[26] Property owners can vindicate their right to exclude—"the '*sine qua non*' of property"[27]—through common law causes of action

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22 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

23 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as state law.").

24 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, 435 (1982) ("[T]he landowner's right to exclude[ is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))); Cedar Point Nursery v. Hassid, 594 U.S. 139, 150 (2021).

25 Phillips v. Wash. Legal Found., 524 U.S. 156, 169–70 (1998).

26 *See, e.g.*, *Cedar Point*, 594 U.S. at 160–61 (noting that invasions are not takings when the intruder abides by "common law privileges to access private property" with roots in tort law); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence."); *see also* John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 787–90 (2020) (discussing the "close substantive relationship" between torts and physical takings). Scholars have traced the development of takings litigation from a "justification-stripping" model—in which the right to just compensation under the Fifth Amendment operated by stripping government officials of liability shields where the government action would amount to common law trespass, thus enforcing inherent constitutional limits on legislatures' ability to strip property owners of such causes of action—to a "remedial duty" model in which the Fifth Amendment instead created an independent damages action directly entitling property owners to just compensation. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999).

27 *Cedar Point*, 594 U.S. at 150 (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998)).

like trespass.[28] By displacing exclusionary causes of action that would otherwise be available to private actors for the challenged conduct—either against the government itself or against third parties granted access to property—the government action definitionally affects a property right.[29]

The case of *Cedar Point Nursery* suggested an embrace of this tort-taking principle by holding that a California labor regulation violated the Takings Clause.[30] Under California's Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975,[31] nonemployee union organizers were given limited access to privately owned agricultural worksites "for the purpose of meeting and talking with employees and soliciting their support."[32] California argued that the access afforded to union organizers under the regulation did not vest a formal property interest—such as an easement—under California law in either the government itself or a third-party and so nothing was "taken" from the growers who owned the farmland.[33] The Court held that this "slight mismatch" from California property law did not mean there was no effect on the growers' property interest.[34] Instead, the Court reasoned that if a private actor, *but for* government action, would otherwise have a right to exclude, then government action abrogating that specific cause of action affects a cognizable property interest by definition.[35]

Critically, the *Cedar Point* Court measured the existence of the right to exclude by reference to the counterfactual availability of a cause of action for trespass against the organizers.[36] The Court noted that "without

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28 *Compare* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) ("But a mere unilateral expectation or an abstract need is not a property interest entitled to protection."), *with* Ethan W. Blevins, *Cyber Takings: A Preliminary Study of Regulating Takings of Virtual Spaces*, 20 J.L. Econ. & Pol'y 333, 342–43 (2025) (noting that societal recognition of the right to exclude is usually manifested in the form of "a legal entitlement that validates and protects the exclusionary interests of the owner through trespass and similar property doctrines"), *and* Raymond T. Nimmer, Jeff C. Dodd & Lorin Brennan, Information Law § 2:4, Westlaw (database updated Nov. 2025) ("Property rights coexist with and are enforced through tort law. Thus, I own the property that comprises my residence, but in enforcing ownership rights against a third party, I must resort to the tort claim of trespass or the criminal law of burglary.").

29 *See* Brauneis, *supra* note 26, at 67–68; Echeverria, *supra* note 26, at 790 ("The Court still commonly equates occupations with trespasses, and appropriations with conversions." (footnote omitted)). Note that this is different from the recognition of a broad, unspecified cause of action itself as a protected property interest. *See* Stern, *supra* note 21, at 304 n.103.

30 *See Cedar Point*, 594 U.S. at 152.

31 Cal. Lab. Code § 1140–1166.3 (West, Westlaw through Ch. 764 of 2025 Reg. Sess.).

32 Cal. Code Regs. tit. 8, § 20900(e) (2025), 8 CA ADC § 20900 (Westlaw).

33 *See Cedar Point*, 594 U.S. at 155.

34 *Id.*

35 *See id.* at 155–56.

36 *Id.* at 155 (citing Allred v. Harris, 18 Cal. Rptr. 2d 530, 533 (Ct. App. 1993) (holding that an injunction against antiabortion picketing in the parking lot of a medical center was an appropriate remedy because such conduct was a "continuing trespass")).

the access regulation, the growers would have had the right under California law to exclude union organizers from their property. And no one disputes that the access regulation took that right from them."[37] By depriving the growers' of their cause of action for trespass against the organizers, the Court held, California had taken an interest in property without just compensation in violation of the Fifth Amendment.[38] It is this reasoning that may save the Board's attempts to expand workers' rights on workplace communications platforms from takings liability.

## II. *PURPLE COMMUNICATIONS* AND WORKER ACCESS TO EMPLOYER COMMUNICATION SYSTEMS UNDER THE NLRA

### *A. The NLRA and Its Administration*

Passed in the wake of widespread labor unrest in the early twentieth century, the NLRA was a key piece of New Deal legislation that both defined and enforced workers' right to organize unions and collectively bargain.[39] The NLRA remains the primary federal law regulating labor relations—American labor law's "basic governing text."[40] The passage of the NLRA in 1935 as a one-sided statutory initiative to empower workers[41] nonetheless gave way to a regulatory regime marked by an attempt at balancing workers' interests with employers' property and managerial interests, especially after the passage of the more employer-friendly Taft-Hartley Amendments in 1947.[42]

Section 7 of the NLRA protects employees' rights to form, join, or assist labor organizations, setting out broad terms defining the enforceable statutory rights of workers by providing the following: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

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37 *Id.* (citation omitted).

38 *See id.* at 155–56.

39 *See* AM. BAR ASS'N, *supra* note 1, § 2.II–III.

40 Estlund, *supra* note 1, at 1532.

41 *See* AM. BAR ASS'N, *supra* note 1, § 2.IV (noting that early critics of the NLRA largely "took the view that the Act was one-sided legislation, slanted heavily in favor of organized labor"); Brandon R. Magner, *Whither the Wagner Act: On the Waning View of Labor Law and Leviathan*, 27 EMP. RTS. & EMP. POL'Y J. 1, 15, 16–17 (2024) ("Employers, of course, were shut out of the [drafting] process altogether. . . . The NLRA was emphatically not an example of political potpourri; it contained virtually zero logrolling or horse-trading which may have lopped off protections or tacked on restraints to distort its original objective.").

42 Labor Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136, 136–52 (1947); *see also* Gali Racabi, *Balancing Is for Suckers*, 109 CORN. L. REV. 63, 68, 85–86 (2023) ("Balancing is the legal technique with which courts and employers killed the NLRA, one doctrinal balancing act at a time.").

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[43]

The broad swath of industrial conduct captured within the language of this clause and protected by the law are generally referred to as "Section 7 activities."[44] Under the NLRA, it is an "unfair labor practice" for employers to "interfere with, restrain, or coerce" workers in their exercise of these rights.[45] The Board is tasked with implementing this framework by interpreting and enforcing Section 7 rights.[46]

Open communication between coworkers forms the bedrock of these rights in both unionized and nonunionized workplaces.[47] Worker communications are protected from the very first kernel of collective action through the enforcement of a completed collective bargaining agreement.[48] Section 7 protection extends to any worker-to-worker communications seeking "to improve terms and conditions of employment or otherwise improve" their working lives—even where that communication is external to the "immediate employee-employer relationship."[49]

### *B. The Board's Attempts to Regulate Worker Access to Employer-Owned DIC Systems*

The Board's 2014 decision in *Purple Communications* was animated by its responsibility "to adapt the Act to [the] changing patterns

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43 29 U.S.C. § 157; *see also* Am. Bar Ass'n, *supra* note 1, § 2.III (discussing the definition of rights in Section 7).

44 *See, e.g.*, Elena N. Broder, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 Yale L.J. 1639, 1646, 1659 (1996).

45 29 U.S.C. § 158(a).

46 *See* Michael C. Duff, Jeffrey M. Hirsch & Paul M. Secunda, Labor Law 11–12, 31–33, 115 (3d ed. 2025).

47 *See, e.g.*, Cent. Hardware Co. v. NLRB, 407 U.S. 539, 542–43 (1972) ("[Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights."); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491–92 (1978) (noting that Section 7 "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite"); NLRB v. Wash. Aluminum Co., 370 U.S. 9, 17–18 (1962) (holding that Section 7 protection extends to nonunionized workers).

48 *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (holding that "a conversation may constitute a [protected] concerted activity [under Section 7]" where it "appear[s] at the very least, that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees"); Hirsch, *supra* note 6, at 1124 ("Throughout the representation process—from the initial stages of employees' contemplating the desirability of collective representation to the later steps of ultimately choosing a specific representative—discourse and access to certain types of information is [sic] crucial.").

49 Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978) (finding that workers were engaged in protected Section 7 communications when distributing newsletters about their union's political advocacy on right-to-work and minimum wage laws).

of industrial life."[50] There, the Board set out a rule to address a pressing development in the modern workplace and concluded that the increasing dominance of DIC platforms[51] and the rapid integration of those systems into workers' organization strategies[52] required a bold new rule: Work rules prohibiting workers from using those platforms for organizational purposes were presumptively unlawful under the NLRA.[53]

### *1. Initial Approach:* Register-Guard

This regulatory issue—pitting employers' asserted right to control their workers' communication on DIC platforms against workers' asserted right to use those platforms for protected Section 7 activity—first came before the Board in the 2007 case of *The Guard Publishing Co. (Register-Guard)*,[54] where the Board concluded that workers' rights should generally give way to employers' rights.[55]

The employer in that case, a newspaper publisher, maintained the following policy:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.[56]

As both sides acknowledged, this language undoubtedly swept broadly to forbid workers' use of the company's email system for Section 7 purposes.[57] Although the Board had long settled its approach to similar blanket rules concerning oral and written communications,[58]

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50 NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

51 *See generally* Ana Tkalac Verčič, Dejan Verčič, Sinja Čož & Anja Špoljarić, *A Systematic Review of Digital Internal Communication*, 50 PUB. RELS. REV., Mar. 2024, https://www.sciencedirect.com/science/article/abs/pii/S0363811123001157 [https://perma.cc/A6MF-VQ7G] (analyzing the increased presence of and focus on digital internal communication platforms).

52 *See* Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 948 (2015); Yardena Katz, *The Essential Potential of Labor Organizing Technology*, COLUM. SCI. & TECH. L. REV.: BLOG (Dec. 14, 2020), https://journals.library.columbia.edu/index.php/stlr/blog/view/290 [https://perma.cc/MMX8-RQWR].

53 *See* Purple Commc'ns, Inc., 361 NLRB 1050, 1050 (2014).

54 351 NLRB 1110 (2007).

55 *See id.* at 1114.

56 *Id.* at 1111.

57 *See id.* at 1112.

58 *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945) (enforcing a Board rule that made it unlawful for employers to maintain work rules forbidding oral solicitation on company property during nonworking time); Stoddard-Quirk Mfg. Co., 138 NLRB 615, 621 (1962)

the applicability of those doctrines to digital communications was an issue of first impression.[59]

The *Register-Guard* Board—and all successive Boards considering work rules banning solicitations on employer-owned DIC platforms—approached the issue within the broader context of technological change in the workplace and its effect on the forms of Section 7 communications.[60] There is a broad spectrum of DIC platforms, both hardware and software based, through which this communication might take place.[61] On one end of the spectrum, workers might communicate with one another about work-related topics via Short Message Service texting, a function already available on devices they personally own and pay for.[62] On the other end, workers might communicate with one another via a proprietary platform created by their employer, which is itself accessed via company-owned computers.[63] In between lies a seemingly endless proliferation of software such as Slack, Microsoft Teams, or Google Workspace—all of which perform DIC functions, often delivered as a third-party service offering a wide range of customizable features.[64]

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(holding that it is presumptively unlawful for employers to restrict written distributions in nonworking areas on nonworking time).

59 *See Register-Guard*, 351 NLRB at 1114.

60 *See, e.g.*, *id.* at 1116; Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 7–8 (Dec. 16, 2019).

61 *See* Andrew Froehlich & Kate Brush, *Definition: Team Collaboration Tools*, TechTarget (Apr. 28, 2023), https://www.techtarget.com/searchunifiedcommunications/definition/team-collaboration-tools [https://perma.cc/AR46-BWC7].

62 *See* Jose Maria Barrero, Nicholas Bloom, Shelby Buckman & Steven J. Davis, *SWAA June 2023 Updates*, WFH Rsch., June 5, 2023, at 22–23, https://wfhresearch.com/wp-content/uploads/2023/06/WFHResearch_updates_June2023.pdf [https://perma.cc/CG7M-6M3A] (survey data finding that 46% of fully in-person workers message on their personal phones for work purposes, while 42.7% of remote or hybrid workers do the same); D. Jacques Smith & Rebekkah R.N. Stoeckler, *Bring Your Own Device Policies: A Strategic Guide for Regulated Industries*, Arent-Fox Schiff (Dec. 21, 2023), https://www.afslaw.com/perspectives/alerts/bring-your-own-device-policies-strategic-guide-regulated-industries [https://perma.cc/XF6J-YVNX] (noting the prevalence of workers' use of personally owned devices pursuant to company policy is motivated by firms' desire to "increase productivity, reduce company costs, and provide employees with flexibility"); Callie Holtermann, *Should We Really Be Texting for Work?*, N.Y. Times (Sep. 12, 2023), https://www.nytimes.com/2023/09/12/style/co-workers-texting-work.html [https://perma.cc/N2NJ-ZKG4] (discussing the social aspects of increasing personal phone use in the workplace).

63 *See* Smith & Stoeckler, *supra* note 62.

64 *See* Froehlich & Brush, *supra* note 61; H. Ward Classen, *SaaS Agreements: Key Contractual Provisions*, A.B.A. Bus. L. Section: Bus. L. Today (Nov. 2, 2021), https://businesslawtoday.org/2021/11/saas-agreements-key-contractual-provisions [https://perma.cc/A8ZT-YAF7]; *see also, e.g.*, *Sign up for Microsoft Teams as Part of a Business Subscription*, Microsoft: Learn (Jan. 6, 2025) https://learn.microsoft.com/en-us/microsoft-365/admin/simplified-signup/signup-teams-business-subscription?view=o365-worldwide [https://perma.cc/7RRR-T5R6] (discussing Microsoft Teams business subscription); *Make Teamwork More Productive*, Slack, https://slack.com/pricing [https://perma.cc/YN3W-J7YS] (last visited Nov. 4, 2025) (describing Slack business subscriptions).

In decentralized and fully remote workplaces especially, these platforms present unique opportunities for union-inclined workers to connect with compatriots who may otherwise be beyond the reach of their organizing efforts.[65] Hybrid and fully in-person workers likewise have and will continue to make use of such systems, with opportunities for beneficial utilization in the initial organizing stage through collective bargaining and beyond.[66] Employers have routinely regarded truly open communication between workers on these platforms as a threat.[67] In response, they have gone to great lengths to project their power to regulate such platforms, going so far as to directly moderate worker-created content that they perceive to be pro-unionization.[68]

In *Register-Guard*, contrary to the employer and its amici, the General Counsel and the union argued that the differences between these digital communications and the traditional categories of work rules restricting oral and written communications were sufficiently pronounced to warrant a new framework.[69] The employer and its amici argued in response that company email systems were indistinguishable from the "equipment"—such as telephones,[70] televisions,[71] and

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65 *See, e.g.*, William C. Selfridge, Comment, *A More Pixelated Union: A Look at the Path to Unionization in the Video Game Industry Under Trump's National Labor Relations Board*, 29 U. MIA. BUS. L. REV. 164, 189–90 (2021) (discussing increased importance of internal communications systems for union organizing efforts by video game developers).

66 *See* Hirsch, *supra* note 52, at 953. For example, even workers who aren't fully remote can benefit from centralized access to their coworkers' contact information. *See id.* (noting easy accessibility to co-workers' contact information through the use of employer-owned communications platforms as a significant benefit to union organizing).

67 *See* Wesley Hilliard, *Apple Guts Internal Communication Tool, Crippling Union Organization*, APPLEINSIDER (July 19, 2023, at 16:17 ET), https://appleinsider.com/articles/23/07/19/apple-guts-internal-communication-tool-crippling-union-organization [https://perma.cc/83LM-P7AM]; Ken Klippenstein, *Leaked: New Amazon Worker Chat App Would Ban Words Like "Union," "Restrooms," "Pay Raise," and "Plantation,"* INTERCEPT (Apr. 4, 2022, at 15:27 ET), https://theintercept.com/2022/04/04/amazon-union-living-wage-restrooms-chat-app [https://perma.cc/M26B-R2Q4]; Lauren Kaori Gurley, *Internal Slacks Show HelloFresh Is Controlling Talk of Unionization*, VICE (Nov. 19, 2021, at 15:14 ET), https://www.vice.com/en/article/internal-slacks-show-hellofresh-is-controlling-talk-of-unionization [https://perma.cc/H4JA-2RP4].

68 *See* Klippenstein, *supra* note 67; Hilliard, *supra* note 67.

69 *See* The Guard Publ'g Co. (Register-Guard), 351 NLRB 1110, 1112–14 (2007).

70 *See* Union Carbide Corp., 259 NLRB 974, 980 (1981) (holding employer "could unquestionably bar its telephones to any personal use by employees"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983); Churchill's Supermarkets, Inc., 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . . ."), *enforced*, No. 87-6064, 1988 WL 96508 (6th Cir. Sep. 20, 1988).

71 *See* Mid-Mountain Foods, Inc., 332 NLRB 229, 230 (2000) (rejecting a statutory right to use television in the company breakroom for organizational purposes), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001).

bulletin boards[72]—that the Board had considered across a long line of precedents.[73]

The *Register-Guard* majority agreed with the employer that the equipment doctrine should govern and, in so doing, imported concepts of property into its balancing analysis.[74] To support its placement of company email systems into the equipment line of cases, the majority characterized an employer's "regulat[ion] and restrict[ion of] employee use of company property" as a "basic property right."[75] As with those cases, the majority concluded that the employer's implicated property right, along with its managerial prerogative, should weigh against the workers' organizational rights.[76] Inevitably, the scales tipped, and the Board relied on the property right it had identified to formulate a straightforward categorical rule: Employer policies prohibiting employees from using company email systems to exercise their organizational rights were presumptively lawful so long as enforcement of such rules was not discriminatory—with no compelling business justification required.[77]

The partial dissent of Members Liebman and Walsh, in arguing that blanket bans of Section 7 communications on employer-owned email systems should be unlawful, sought to take the alleged property right—pointedly placed in scare quotes—out of the picture completely.[78] The dissent attempted to distinguish the equipment cases by downplaying both the existence and strength of any relevant property right as well as the harm that would result from holding these employer restrictions unlawful.[79] To the minority, this was evident from the nature of the technology itself: Email systems are marked by their "multidimensional" functionality and "versatility" and, more importantly, are essentially

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72 *See* Eaton Techs., Inc., 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board.").

73 *See Register-Guard*, 351 NLRB at 1113–16.

74 *See id.* at 1114. The reflexive importation of property rights to act as a counterweight against workers' rights is nothing new to NLRA jurisprudence. *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 680–81 (1981) ("[T]he [NLRA] is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."); Stoddard-Quirk Mfg. Co., 138 NLRB 615, 616–17, 616 n.2 (1962) (noting that application of the NLRA to novel workplace dynamics inherently involves "striking a proper adjustment between conflicting rights" such that "the abridgement of either right [is] kept to a minimum"); Racabi, *supra* note 42, at 68.

75 *Register-Guard*, 351 NLRB at 1114 (quoting *Union Carbide*, 714 F.2d at 663–64).

76 *See id.* at 1114–16.

77 *See id.* at 1116.

78 *See id.* at 1126 (Liebman & Walsh, Members, dissenting in part) ("But ownership, simpliciter, does not supply the Respondent with an absolute right to exclude Section 7 e-mails.").

79 *See id.* at 1125 ("Given the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper.").

infinite in their capacity.[80] Unlike the more rudimentary implements addressed in the equipment doctrine, sending an email "impose[s] no additional cost" to the employer and "would not preclude or interfere with simultaneous use by management or other employees."[81] And on a more metaphysical level, the dissent questioned whether the traditional right to exclude could apply to access to such systems at all, remarking that "the [employer] does not own cyberspace."[82]

Further, the dissent noted that holding employer restrictions on worker use of company email for organizational purposes unlawful would *not* create a right for workers to use these systems that their employer had not already granted in the normal course of business, arguing that by maintaining this limitation, employers' property rights should not be in play.[83]

### 2. *The* Purple Communications *Rule*

The Board took the opportunity to revisit the issue in 2014, but now the *Register-Guard* minority found itself at the driver's seat and used the opportunity to fashion a more worker-friendly rule.[84] The workers in *Purple Communications* were subject to another blanket rule against communications on the employer's email system "on behalf of organizations or persons with no professional or business affiliation with the Company."[85] Faced with essentially the same arguments it had considered in *Register-Guard*, the Board now concluded that company email systems operate in modern workplaces as a "natural gathering place"[86] like the proverbial water cooler, and so, the majority reasoned, workers' access to company email systems for Section 7 purposes is a statutory right which must be protected to the same extent as workers' access to the *actual* company water cooler.[87] The resulting rule states that "employees who have rightful access to their employer's email system in the course of

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80 *Id.* at 1125–26 (noting that workers can engage in conversation in real time with entire swaths of the workplace, or recipients can engage with the communications they receive at their leisure).

81 *Id.* at 1125.

82 *Id.* at 1126 (citing Reno v. ACLU, 521 U.S. 844, 850 (1997)).

83 *See id.* at 1124–27 (noting that workers who use company email in the normal course of business "are not only 'rightfully' on the [employer]'s real property, the building itself," but also "rightfully on (using) the computer system"); *see also* Hudgens v. NLRB, 424 U.S. 507, 521 n.10 (1976) (noting that where organizational activity is "carried on by employees already rightfully on the employer's property . . . the employer's management interests *rather than his property interests*" are implicated (emphasis added)).

84 *See* Purple Commc'ns, 361 NLRB 1050, 1050 (2014).

85 *Id.* at 1051.

86 *Id.* at 1057, 1061 (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 490 (1978)).

87 *See id.* at 1053, 1057.

their work have a right to use the email system to engage in Section 7–protected communications on nonworking time."[88]

Notably, the effect of this holding was limited in three ways, each of which suggests that the counterfactual availability of a tort action for trespass against the authorized conduct is limited. First, the holding was a rebuttable presumption; when "special circumstances necessary to maintain production or discipline justify restricting . . . employees' rights" could be proven, policies such as the one at bar could overcome that presumption and might be lawful under the Act.[89] Second, this statutory right applied only to employees with preexisting access to employer email systems; no such rights were extended to employees without preexisting access nor to nonemployee organizers.[90] Finally, the Board did not extend this holding to any other kind of employer-owned DIC platform besides email.[91]

Although no court ever reached the merits, *Purple Communications* did face takings challenges in federal court[92] before it was overturned in *Rio All-Suites*.[93] Should the Board ultimately return to the *Purple Communications* rule—as former General Counsel Jennifer Abruzzo repeatedly urged during her tenure[94] and as the Board has openly entertained doing in recent opinions[95]—it will likely need to contend with takings challenges. And the invalidation of a facially similar labor access regulation in *Cedar Point* only seems to heighten the

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88 *Id.* at 1063.

89 *Id.*

90 *Id.* ("Our decision encompasses email use by employees only; we do not find that nonemployees have rights to access an employer's email system.").

91 *See id.* Before the Trump administration flipped the composition of the Board in 2017, General Counsel Richard Griffin did make attempts to expand this holding, albeit unsuccessfully. *See* W. Eric Baisden & Peter N. Kirsanow, *Change Is Coming: New NLRB General Counsel Issues Memorandum Rescinding Controversial Policies and Signaling Change*, BENESCH (Dec. 7, 2017), https://www.beneschlaw.com/resources/change-is-coming-new-nlrb-general-counsel-issues-memorandum-rescinding-controversial-policies-and-signaling-change.html [https://perma.cc/RTT8-GRNN].

92 *See, e.g.*, Brief of Amici Curiae HR Policy Association et al. in Support of Purple Communications, Inc. at 24–27, Commc'n Workers of Am. v. NLRB, No. 17-70948 (9th Cir. Oct. 10, 2017), 2016 WL 9820145 (arguing that the *Purple Communications* rule constitutes a physical taking); *see also* Luke A. Wake, *Check Your Rights at the Door: Rethinking Confiscatory Regulation*, 68 DRAKE L. REV. 123, 167 (2020) ("One might then invoke *Horne* and *Loretto* in challenge of a National Labor Relations Board (NLRB) rule purportedly authorizing employees to use a company's private computers or e-mail systems for nonbusiness purposes.").

93 *See infra* Section II.B.3.

94 NLRB Gen. Couns. Mem. 21-04, at 1, 3 (Aug. 12, 2021), https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c [https://perma.cc/L36R-E2TJ] (expressing an intent to reconsider *Rio All-Suites*); Gen. Couns. Garten Trucking Brief, *supra* note 12, at 49 ("[T]he General Counsel urges the Board to revisit and overturn *Rio All-Suites* . . . ."); Gen. Couns. Tesla Brief, *supra* note 12, at 18 (urging the Board to overrule *Rio All-Suites* and return to the *Purple Communications* rule).

95 Com. Solar Ariz., LLC, 373 NLRB No. 69, slip op. at 2 n.14 (June 14, 2024); Pro Residential Servs., Inc., 373 NLRB No. 100, slip op. at 3 n.7 (Sep. 25, 2024).

risk that such a claim could successfully restrict the Board's ability to meaningfully act on the issue.

*i. Applying the Takings Property Framework to the Rule*

In applying the takings framework developed above to the *Purple Communications* rule, the most relevant inquiry for courts focuses on whether the conduct that the rule authorizes would otherwise be actionable under state property law. Upon review of the relevant torts, the result of that inquiry may serve to invalidate the rule because it fails to introduce a limiting principle that effectively avoids harm to recognized property rights.

State law is generally uniform in requiring at least de minimis actual harm for trespass to chattels against digital platforms.[96] In the leading case of *Intel Corp. v. Hamidi*,[97] the California Supreme Court held that digital trespass to chattels requires actual harm.[98] There, a discharged worker sent a deluge of spam emails to Intel's company system but did so without using the system "in any manner in which it was not intended to function" or otherwise "impair[ing] the system in any way."[99] Intel sued for trespass to chattels and, along with various amici, argued that when that tort is extended to the digital context, it should not retain the actual harm requirement from the physical context.[100]

The California Supreme Court rejected this proposed modification to its tort law and held that the defendant did not commit trespass against

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96 *See, e.g.*, San Miguel v. HP Inc., 317 F. Supp. 3d 1075, 1088 (N.D. Cal. 2018) (holding that use of a computer system that exceeds the scope of the user's authorized access can support a claim for digital trespass under California law so long as the unauthorized use causes actual harm); Hecht v. Components Int'l, Inc., 867 N.Y.S.2d 889, 898–99 (Sup. Ct. 2008) (holding that a former employee's destruction of a "large number of emails" did not constitute trespass to chattels because absent sufficiently pled allegations of "the nature of the emails or their significance to the business," the unauthorized use was only "harmless intermeddling with the computer system"); Pearl Invs., LLC v. Standard I/O, Inc., 257 F. Supp. 2d 326, 354 (D. Me. 2003) (no trespass for unauthorized access of virtual private network where "there is no evidence that in so doing [defendant] impaired its condition, quality, or value"); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (enjoining a spam advertiser from access to an internet service provider because the amount of messages sent restricted the availability of the service to other users); *see also* Patricia L. Bella, *Defending Cyberproperty*, 79 N.Y.U. L. Rev. 2164, 2175–89 (2004) (discussing different approaches courts have taken to analyzing harm in this context). Some courts have required a greater showing of harm beyond minimal loss of processing power from unauthorized use. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 377 n.24 (5th Cir. 2005) (criticizing courts for "perfunctorily" concluding that any unauthorized use of a computer system "burden[s]" the system such that the actual harm requirement for trespass to chattel is fulfilled based on "little to no evidentiary substantiation").

97 71 P.3d 296 (Cal. 2003).

98 *See id.* at 304, 308.

99 *Id.* at 301, 304.

100 *See id.* at 309.

chattels because his conduct did not cause actual harm.[101] The court noted the availability of different causes of action under which Hamidi may have been liable, but stressed that "[w]hatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property."[102] The same might be said of the claimed property interest in *Purple Communications*.

State courts have generally accepted this reasoning that harm is required,[103] even as scholars have continued to debate the merits of applying this ancient tort to the virtual context.[104] For digital trespass, courts tend to measure harm exclusively by reference to the impacted digital systems themselves.[105] Even direct consequential harm—such as administrative costs incurred in response to unauthorized access or freestanding harm to the external value of the system's services—fails to constitute actual harm.[106]

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101 *See id.* at 304, 308.

102 *Id.* at 308. Although not a common law tort under state law, it would seem notable that even under the federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, which creates a private right of action against individuals who "intentionally access[] a protected computer without authorization," such conduct is only actionable where it causes "damage or loss" to the plaintiff. § 1030(a)(5)(C), (g); *see also* § 1030(e)(8) (defining "damage" as "any impairment to the integrity or availability of data, a program, a system, or information"); § 1030(e)(2)(B) (defining "protected computer" as, inter alia, any computer "which is used in or affecting interstate or foreign commerce or communication").

103 *See* NIMMER ET AL., *supra* note 28, § 2:22 (noting that "the idea of trespass to chattel as a basis for excluding another person's access to a digital environment created or controlled by the plaintiff has become commonplace" but that no courts currently credit such claims that fail to plead actual harm).

104 *See, e.g.*, Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 54 (2000) (arguing that the "logical endpoint" of applying trespass to chattels to digital spaces will result in "a sort of 'anti-commons' in which the rights of use on the net are so fragmented as to prevent anyone from accomplishing anything useful"); Richard A. Epstein, Intel v. Hamidi*: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147, 148, 169–70 (2005); Maureen E. Brady & James Y. Stern, *Analog Analogies:* Intel v. Hamidi *and the Future of Trespass to Chattels*, 16 J. TORT L. 205, 229 (2023).

105 *See, e.g.*, Doe v. CBS Broad. Inc., 806 N.Y.S.2d 38, 39 (App. Div. 2005) (holding that trespass to chattels requires harm to the "condition, quality or material value of the chattels at issue" (citing Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 292–93 (N.Y. 1993))); A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 485–86 (E.D. Va. 2008) (plaintiff failed to state a claim for trespass to chattels where there was evidence only of "consequential damages" flowing from corrective measures taken in response to unauthorized access of plagiarism-detection software), *aff'd in part, rev'd in part sub nom*, A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009); Fischkoff v. Iovance Biotherapeutics, Inc., 339 F. Supp. 3d 408, 417 (S.D.N.Y. 2018) ("In other words, it is not enough to show that the owner of the materials was harmed in some way by the challenged conduct. Rather, the owner must show some type of harm to the chattels themselves."); NIMMER ET AL., *supra* note 28, § 2:22 (noting that courts recognize trespass to chattels claims in the digital context and that, although courts will consider the impact of continued intrusions, the measurement of such harms remains limited to "the system, and not to extraneous issues").

106 *See, e.g.*, WhatsApp Inc. v. NSO Grp. Techs. Ltd., 472 F. Supp. 3d 649, 685 (N.D. Cal. 2020), *aff'd on other grounds*, 17 F.4th 930 (9th Cir. 2021).

But the actual harm requirement does retain some flexibility. Although limiting their analysis to the systems themselves, courts may still consider not only the immediate harm presented at the time the action is brought but also the future harm to the systems that would result if the unauthorized conduct was held permissible.[107]

Under the tort law reviewed above, the vast majority of the conduct authorized by the *Purple Communications* rule would almost certainly fail to meet that definition of actual harm.[108] But a vanishingly small, yet hypothetically possible, subset of the conduct that *Purple Communications* authorizes might constitute actual harm.

Critics have suggested various harms to employers that might flow from the *Purple Communications* rule, including the financial cost of providing server space to workers to engage in Section 7 activities,[109] the financial cost of providing system administration support and maintenance,[110] and the "debilitating impact on productivity and discipline."[111] Even assuming that these predicted harms are anything more than speculative or that they would actually be authorized by the rule as currently constituted,[112] none would rise to the level of actionable trespass to chattels because all involve consequential harm to the employer, rather than harm to the employers' DIC platforms themselves.[113]

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107 *See, e.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (finding actual harm when "search robots" used to access plaintiff's data from its website "consumed a significant portion of the capacity of [plaintiff]'s computer systems" without singlehandedly "incapacitat[ing]" the system but nonetheless presenting "highly probable" risk of inspiring copycats, which would crash the system in aggregate); NIMMER ET AL., *supra* note 28, § 2:22 ("The risk of future and ongoing harm stemming from others following the same pattern of misuse of another person's system is clearly a basis to warrant injunctive relief to protect a digital asset.").

108 *See infra* notes 142–44 and accompanying text.

109 *See* Josh Carroll, *The NLRB's* Purple Communications *Decision: Email, Property, and the Changing Patterns of Industrial Life*, 14 DUKE L. & TECH. REV. 280, 289 (2016).

110 *See id.*

111 Purple Commc'ns, Inc., 361 NLRB 1050, 1068 (2014) (Miscimarra, Member, dissenting); *see also id.* at 1082 (Johnson, Member, dissenting) ("Email . . . poses far more of an acute and substantial danger of infringement on the overall productivity of an employer's enterprise than face-to-face conversation ever could.").

112 The *Purple Communications* majority believed its special circumstances exception would protect employers from suffering actual harm. *See id.* at 1058 n.36 (majority opinion) (noting that the exception would apply to an employer that can "demonstrate that its costs would increase to such an extent that they would constitute special circumstances"). However, the exception has not proved useful since *Purple Communications* was decided. *See* Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 5 ("[I]n the years since *Purple Communications* was decided, the Board has never found special circumstances justifying a prohibition on nonwork-related email."); *see also* Carroll, *supra* note 109, at 287 ("The special circumstances requirement is not defined in the *Purple Communications* majority opinion, and no guidance is offered to employers.").

113 It is for this reason that an in-depth analysis of the actual extent of marginal costs likely to be incurred by employers under such a rule is unnecessary. Regardless, it is highly doubtful that such costs would be significant, if any actual costs would be incurred at all. *See* Hirsch, *supra* note 52, at 951 (noting that additional digital communications authorized by *Purple Communications* "will

Note the limitations on the rule.[114] *Purple Communications* does not give access to any additional users beyond those already authorized to use their employers' DIC platforms, but rather expands the scope of that authorization.[115] The expanded authorization does not give workers access to any potentially valuable information to which they would not already have access, nor does it give workers any right to collect, copy, or disseminate any information, confidential or otherwise, of any value.[116] And even when workers' expanded access would consequentially impose significant marginal costs on the employer, the Board specifically noted that such a scenario would fall under the exception for "special circumstances."[117]

Consider a hypothetical worker who, under *Rio All-Suites* or in a world with no NLRA, began using her company's internal Slack to discuss unionizing with her coworkers in direct violation of the company's policy forbidding nonwork solicitation on Slack.[118] There is no question that she has exceeded the scope of her authorization to use the system in violation of company policy, and in this world, she could be lawfully disciplined—for example, by losing access to Slack—or even fired for such conduct. But there is no applicable law under which she would *also* be liable for any damages for trespass to chattel—barring actual harm to her employer's Slack system.[119] And in a world in which *Purple Communications* forbade her employer from maintaining such rules and from disciplining or firing her for unauthorized use that falls short of actual harm, the scope of her employer's legal exclusionary power would be, facially, entirely unchanged.[120] Nor is there any caselaw

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be such a tiny percentage of the overall number of workplace emails that the marginal cost will be virtually zero").

114 *See supra* notes 89–91 and accompanying text.

115 *See Purple Commc'ns*, 361 NLRB at 1063.

116 *See id.* at 1063–64; Hecht v. Components Int'l, Inc., 867 N.Y.S.2d 889, 899 (Sup. Ct. 2008) ("Interference with information stored on a computer may give rise to trespass to chattel if plaintiff is dispossessed of the information or the information is impaired as to its condition, quality or value.").

117 *Purple Commc'ns*, 361 NLRB at 1058 n.36.

118 The hypothetical would still apply if there were no employee handbook forbidding nonwork use of Slack or if the workplace were already unionized but contained applicable restrictions on workers' use of Slack in its collective bargaining agreement.

119 *See supra* notes 96–107 and accompanying text. Admittedly, in this world, termination of the hypothetical worker's employment might eventually give rise to a legal cause of action against her—but only if she were to continue to access the Slack after her employment and, still, only if her unauthorized access caused actual harm. That contingent cause of action remains untouched by the modified *Purple Communications* rule, which implicitly excepts employers that are victims of actual harm by workers' use of internal communications systems. Nor can her firing itself be considered a cause of action; at best, it can be considered a legal privilege to engage in self-help. *See infra* notes 160–62 and accompanying text.

120 This includes any civil action under the CFAA. Courts generally have held that the civil action made available by the CFAA, which independently requires "damage or loss" of at least

suggesting her employer's entitlement to distinctly property-based remedies that would buttress this right to exclude, such as ejectment, as available to owners of real property,[121] or replevin or trover, as available to owners of personal property.[122]

To be sure, such analogous causes of action might exist for digital trespass, at least theoretically. Few people, if any, would ever pursue them even if they might theoretically lie: Removing a "trespassing" user by yourself will almost always be less costly and time-consuming than initiating judicial action. And the state would typically have no more ability to eject such a trespasser from the system than the owner itself, which already exerts some degree of control over the "space" and is likely more familiar with its function than any court enforcing a hypothetical writ.

Perhaps, then, this suggests that there is a theoretical digital analogue to physical property owners' entitlement to ejectment or replevin or any other equivalent remedy—if anyone were ever litigious enough to pursue it. And if such a digital analogue could theoretically lie, the resulting legal right might rise to the level of the trespass action that the court recognized in *Cedar Point* as sufficient for recognition of a property right.[123] Nonetheless, in *Cedar Point*, it was not in dispute that California law would otherwise recognize a trespass absent the access regulation.[124] For an expanded *Purple Communications* rule, there would be no decisive case to cite for employers' entitlement to judicial remedies that is usurped by the regulation and, accordingly, no cognizable right to exclude. It is difficult to imagine a court recognizing a constitutional property right on such unsettled principles.

However, a gap remains. The Board's failure in *Purple Communications* to adequately define the "special circumstances" that would allow an employer to rebut the presumption of unlawfulness drew particular criticism.[125] And this underdefined exception is precisely what

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$5,000, does not apply to use by authorized workers that exceeds the scope of their authorization. 18 U.S.C. § 1030(c)(4)(A)(i)(I), (g); *see also, e.g.*, Chefs Diet Acquisition Corp. v. Lean Chefs, LLC, No. 14-cv-8467, 2016 WL 5416498, at *6 (S.D.N.Y. Sep. 28, 2016) ("[T]o prevail on its claim under the CFAA, [a plaintiff] must show that [d]efendants accessed its computer system without approval; it is not enough to prove access to information beyond the scope of approval.").

121 *See* Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. Legal Stud. 13, 13 n.2 (1985) ("[T]he action for ejectment serves as an important supplement to the action for trespass . . . ."); Nicolas Suzor, *The Role of the Rule of Law in Virtual Communities*, 25 Berkeley Tech. L.J. 1817, 1836 (2010) ("[P]roviders [in virtual communities] often purport to have absolute discretion on the exercise of their power to eject participants under both contract and property law.").

122 *See* David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 Wm. & Mary L. Rev. 1691, 1714 n.83 (1994).

123 *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 155–56 (2021); *supra* notes 33–35 and accompanying text.

124 *See Cedar Point Nursery*, 594 U.S. at 155; *supra* notes 33–35 and accompanying text.

125 *See, e.g.*, Carroll, *supra* note 109 at 287.

might have doomed the *Purple Communications* rule to facial takings liability had a court ever reached the merits of that question.

That is because the Board did not specifically address scenarios where workers' Section 7 activity might cause harm to the *system itself*. Such a speculative scenario might fall within the above exception, but the rule fails to make clear if harm to the system itself falls within the scope of that exception per se.[126] It is such a scenario—and the gap in the rule that permits it—that presents the greatest takings risk to the entire regulatory effort. By authorizing such conduct, the *Purple Communications* rule arguably destroys the trespass to chattels liability that would otherwise flow from worker conduct causing harm to DIC platforms themselves.[127] That harm might amount to actual harm under the tort of trespass to chattels, meaning that the rule does abrogate tort liability.

Under the framework for identification of property rights illustrated in *Cedar Point*, this vulnerability could allow a takings challenge past the threshold, beyond which thorny issues await the Board. Does the so-called "physical takings" doctrine apply to digital "spaces"?[128] Can workers really "occupy" such "spaces"? Does it matter that the rule regulates only the conduct of workers already using these digital systems?[129] Those difficult questions might lead to unfavorable answers.

### *3. The Current Law:* Rio All-Suites

After *Purple Communications*, jubilation[130] and outrage[131] ensued, and within a month of the first Trump Administration, new NLRB General Counsel Peter Robb loudly placed *Purple Communications*

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126 *See* Purple Commc'ns, Inc., 361 NLRB 1050, 1058 n.36. (2014).

127 *See supra* notes 30–38 and accompanying text.

128 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (establishing a per se rule whereby all "permanent physical occupation[s]" constitute takings "without regard to the public interests that [they] may serve"); Blevins, *supra* note 28 at 342–43; *c.f.* Moody v. NetChoice, LLC, 603 U.S. 707, 783–84 (2024) (Alito, J., concurring) (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83, 87–88 (1980)) (analogizing state regulation of content moderation by social media platforms to state regulation of use restrictions in physical space open to the public for First Amendment purposes).

129 Some courts have said no. *See, e.g.*, Darby Dev. Co. v. United States, 112 F.4th 1017, 1036 (Fed. Cir. 2024) ("At bottom, just because tenants (or other occupiers of property) were at one point 'invited' does not mean that their continued, government-compelled occupation cannot, under any circumstances, be treated as a physical taking.").

130 *See, e.g.*, Moshe Z. Marvit, *Thanks to Labor Board Ruling, You Can Now Use Company Email to Organize a Union*, In These Times (Dec. 12, 2014), https://inthesetimes.com/article/company-email-union [https://perma.cc/HG6K-5H4A].

131 *See, e.g.*, Christine Neylon O'Brien, *Am I Blue or Seeing Red? The NLRB Sees Purple when Employer Communication Policies Unduly Restrict Section 7 Activities*, 66 Lab. L.J. 75, 81–83 (2015); Carroll, *supra* note 109, at 282.

on his "endangered decisions list,"[132] rescinding prior initiatives that sought to expand the ruling's reach[133] and expressing his intent to present an "alternative analysis" to the Board in cases that presented such opportunities.[134]

In *Rio All-Suites*, the Board found and seized on such an opportunity to return to the holding of *Register-Guard*.[135] There, the respondent-hotel's employee handbook prohibited workers from "[s]end[ing] chain letters or other forms of non-business information" on company email.[136] Both sides advanced arguments essentially identical to those in *Register-Guard* and *Purple Communications*, disputing the legitimacy of the claimed property right.[137]

The majority opinion chastised the *Purple Communications* Board for "impermissibly discount[ing] employers' property rights in their IT resources" and returned the issue to the "equipment" realm.[138] There, balancing dictated a rule wherein employers' right to exclude from company-owned email could be impinged only when alternative "adequate avenues of communication" were unavailable.[139] Only at that point would denying workers access to these systems for Section 7 purposes create an "unreasonable impediment to the exercise of the right to self-organization" in violation of the NLRA.[140]

Member McFerran argued in dissent that the majority's exercise in balancing employers' property rights—and the right to exclude specifically—was misguided when, as in *Rio All-Suites*, the property right in question was "a relatively weak one" that was only marginally harmed, if at all, by the countervailing exercise of workers' Section 7 rights.[141]

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132 Michael M. Oswalt, *Liminal Labor Law*, 110 CALIF. L. REV. 1855, 1866 (2022).

133 *See, e.g.*, NLRB Adv. Mem. 12-CA-141201, at 15–17 (Oct. 8, 2015), https://apps.nlrb.gov/link/document.aspx/09031d45824c80cf [https://perma.cc/L2H4-MMVF] (arguing for expansion of *Purple Communications* to additional electronic communications); NLRB Adv. Mem. 28-CA-175402, at 7–11 (Sep. 16, 2016), https://apps.nlrb.gov/link/document.aspx/09031d45824c80d4 [https://perma.cc/GSN7-TWYN] (same).

134 NLRB Gen. Cous. Mem. 18-02, at 2 (Dec. 1, 2017), https://apps.nlrb.gov/link/document.aspx/09031d458262a31c [https://perma.cc/7Q63-NBRP] (expressing an intent to overturn *Purple Communications* and rescinding the Division of Advice memoranda seeking to expand *Purple Communications*); *see also* Michael J. Lotito & Maury Baskin, *New NLRB GC Memorandum Signals Changes Are Ahead*, LITTLER (Dec. 4, 2017), https://www.littler.com/publication-press/publication/new-nlrb-gc-memorandum-signals-changes-are-ahead [https://perma.cc/M8DM-QGHU] (describing effects of the memorandum).

135 *See* Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 1 (Dec. 16, 2019).

136 *Id.* at 2.

137 *See id*. at 4.

138 *Id.* at 1.

139 *Id.* at 7 (quoting Le Tourneau Co. of Ga., 54 NLRB 1253, 1260 (1944)).

140 *Id.* (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945)).

141 *Id.* at 21–22 (McFerran, Member, dissenting in part).

Member McFerran supported this assertion by noting that, unlike for real property, the common law of torts requires "actual harm" to be cognizable as trespass against personal property.[142] Workers' use of employer-owned DIC platforms for organizational purposes, she argued, presents little risk of "actual harm" relative to the "equipment" cases, in which nonwork use of equipment "necessarily diverts its use from the employer's purposes and consumes (or otherwise diminishes) the employer's limited resources."[143] Use of employer-owned DIC platforms, however, causes no such diversion.[144]

Since *Rio All-Suites*, the dominance of DIC systems in modern workplaces has grown exponentially.[145] Any number of eye-popping statistics are available to confirm what many already suspect: The COVID-19 pandemic forced millions of workers to acclimate to the new norm of DIC platforms, and the prevalence of these systems seems likely to only continue to grow.[146]

For workers, this rapid integration has affected every aspect of their workplace experience, causing fundamental change to the ways workers engage with their employers,[147] maintain or lose productivity,[148] and

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142 *Id.* at 21 n.57 (quoting Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003)).

143 *Id.* at 21 n.58.

144 *See id.*; Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) ("[T]he space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking.").

145 *See* Gen. Couns. Tesla Brief, *supra* note 12, at 23–25 (collecting statistics indicating rapid and widespread adoption of DIC technology in American workplaces).

146 *See, e.g.*, Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, Pew Rsch. Ctr., How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work 7 (2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/12/PSDT_12.09.20_covid.work_fullreport.pdf [https://perma.cc/UV2X-FWLR]; Nina Mast & Lisa Kresge, UC Berkeley Lab. Ctr., How Common Is Employers' Use of Workplace Management Technologies? A Review of Prevalence Studies 4 (2022), https://laborcenter.berkeley.edu/wp-content/uploads/2022/10/Tech-Prevalence-Paper-FINAL.pdf [https://perma.cc/UT3C-FNP5] (reviewing scientific literature surveying utilization of DIC technology and concluding that "firms' adoption of workplace management technologies is still in its growth phase"); Brandon Vigliarolo, *Email Out, Slack and Teams In for Business Communications*, Register (May 10, 2022, 13:00 UTC), https://www.theregister.com/2022/05/10/business_comms_swzd [https://perma.cc/M28P-JVSL] ("Now with a large majority of workers using [DIC platforms] frequently and 'digitally native' workers increasingly entering the workforce, we can expect employee preferences to continue to shift away from email to these more interactive platforms.").

147 *See* Linjuan Rita Men, Julie O'Neil & Michele Ewing, *Examining the Effects of Internal Social Media Usage on Employee Engagement*, 46 Pub. Rels. Rev., June 2020, at 2, https://www.sciencedirect.com/science/article/abs/pii/S0363811120300011 [https://perma.cc/JC6Y-8YWK].

148 *See* Sean Hargrave, *How Slack Ruined Work*, Wired (Jan. 13, 2020, 01:00 ET), https://www.wired.com/story/slack-ruining-work [https://perma.cc/KN5N-VJCH] (surveying scientific research showing detrimental effects on productivity from usage of internal platforms such as Slack).

set boundaries between their work and nonwork time.[149] The law of the workplace has struggled to keep up with technological advancements.[150]

## III. Modification of the *Purple Communications* Rule to Exclude Otherwise Trespassory Access Successfully Skirts Takings Liability

Should the Board return to the rule of *Purple Communications*—this time presumably encompassing DIC platforms beyond simple email to include "any other electronic communication platform that is used in [the] workplace"[151]—it will need to do so in a way that explicitly avoids injury to a cognizable property interest, as the first iteration seemingly did, albeit not definitively. It can do so by formulating a rule that clarifies that worker conduct leading to actual harm to employer-owned DIC systems would fall within the rule's exception and that employers' nondiscriminatory enforcement of work rules against such conduct would not be unlawful. By expressly stating that it is lawful for employers to regulate worker-to-worker communication on nonworking time only to the extent necessary to prevent actionable harm to relevant DIC platforms under any state property law, the rule would plug the hole left open in the first iteration.

This rule would, just as the original *Purple Communications* rule did, make it presumptively unlawful to maintain the sort of blanket bans on nonwork solicitation on DIC platforms during nonworking time implemented by the employers in *Register-Guard*, *Purple Communications*, and *Rio All-Suites*.[152] Employers maintaining such rules would bear the burden of proof to show that they are laboring under "special circumstances" that excuse their restraint of workers' Section 7 rights.[153] However, unlike the original rule, the modification would specify that

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149 *See* Elizabeth Lopatto, *Slackers*, Verge (Feb. 12, 2024, 13:00 ET), https://www.theverge.com/24070725/slack-ten-year-anniversary-retrospective-groupchat-workplace [https://perma.cc/3NDC-UT6C] ("Slack's idea won. The work group chat is here, and it's always on, even when you're asleep. . . . [O]ur work lives and private lives are bleeding together."); Yiran Zhang, *Home as Non-Workplace*, 105 B.U. L. Rev. 911, 963 (2025) ("Workers laboring full-time in private homes are systematically more isolated from peer workers than their counterparts in group workspaces.").

150 *See* Tammy Katsabian, *The Rule of Technology: How Technology Is Used to Disturb Basic Labor Protections*, 25 Lewis & Clark L. Rev. 895, 941–47 (2021); Opeyemi Akanbi, *Policing Work Boundaries on the Cloud*, 127 Yale L.J.F. 637, 645 (2018) ("[C]urrent labor law provisions are inadequate to govern the use of SaaS applications like Slack, Workplace, and Teams, which blur work and nonwork boundaries.").

151 Gen. Couns. Garten Trucking Brief, *supra* note 12, at 49; Gen. Couns. Tesla Brief, *supra* note 12, at 19.

152 *See* Purple Commc'ns, Inc., 361 NLRB 1050, 1063 (2014); The Guard Publ'g Co. (Register-Guard), 351 NLRB 1110, 1111–12 (2007); Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 2 (Dec. 16, 2019).

153 *See Purple Commc'ns*, 361 NLRB at 1063.

the employer meets its burden of proof by showing either a) that workers use of DIC systems for nonwork purposes on nonwork time has caused actual harm to those systems or b) the employer has reasonable cause to believe that such harm will occur in the future absent a blanket rule.

The work rules of *Register-Guard*, *Purple Communications*, and *Rio All-Suites* would all be presumptively unlawful because they constitute blanket bans on worker communications on company email that extend to nonworking time.[154] And as with the original rule, all three employers would have an opportunity to rebut that presumption.[155] However, unlike the original rule, the modified rule would set a clear benchmark for that rebuttal. If the employers could prove that absent a blanket ban there is a significantly plausible and imminent risk that the resulting authorization will lead to damage to their DIC platform that is cognizable under state property law, then the employer will not have violated the NLRA and will be permitted to maintain the rule. Further, even if employers fail to rebut the presumption, the workers' resulting authorization would not be unlimited. If workers' actual exploitation of that authorization caused cognizable damage under state property law to their employers' DIC platform, then the employer would be within their rights to impose nondiscriminatory discipline against those workers.

Applying this proposed rule to *Intel v. Hamidi* with a slightly different fact pattern would lead to a violation of the NLRA precisely because of the California Supreme Court's outcome in the actual case.[156] Imagine that Intel had maintained a rule equivalent to those scrutinized in *Register-Guard*, *Purple Communications*, and *Rio All-Suites* and that the worker—the defendant in the original case—had filed a charge under the NLRA alleging that Intel's maintenance of that rule violated *Purple Communications*. Intel's rule would be presumptively unlawful. To attempt to rebut it, Intel would need to show that Hamidi's actions had caused it cognizable harm under California property law. But the actual result of the *Intel v. Hamidi* case would defeat Intel's rebuttal attempt, because the court held that Hamidi did not commit trespass against chattels.[157] Therefore, Intel could not prove that the rule was necessary to prevent a significantly plausible and imminent risk of damage to their email system that was cognizable under state property law. Accordingly, in this hypothetical, Intel would have violated the NLRA.

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154 *See* sources cited *supra* note 152.

155 *See Purple Commc'ns*, 361 NLRB at 1063.

156 *See supra* notes 97–102 and accompanying text.

157 *See* Intel Corp. v. Hamidi, 71 P.3d, 296, 311 (2003).

### *A. Such a Modification Would Clarify that No Property Right Is Implicated by the Rule Because No Cause of Action Is Usurped*

The resulting rule would be tightly takings-proof. Employers would be free to regulate their workers' use of DIC platforms during working time in a nondiscriminatory manner. More important, they would also be free to regulate use of DIC platforms during nonworking time only to the extent necessary to prevent harm to the system. This limitation on employer conduct would simultaneously send a signal to workers and their unions: Make use of employer-owned DIC platforms as necessary to support your organizing efforts but never to the extent that you harm the system itself. The resulting equilibrium would keep the rule on the right side of the Takings Clause because the rule would not touch any exclusionary cause of action.[158]

In finding that the access regulation at issue in *Cedar Point* was a taking of a cognizable property right, the Court's reasoning turned on the challenged regulation's usurpation of the growers' cause of action for trespass.[159] Conversely, in shifting from the *Register-Guard* rule to the modified *Purple Communications* rule, no exclusionary causes of action would be abrogated.[160]

An anti–*Purple Communications* employer might alternatively argue that a reviewing court should, even absent authorization of any trespassory conduct sounding in tort, recognize that the modified rule usurps employers' right to exclude from their DIC systems—and in turn implicates a protected property right under the Fifth Amendment—based solely on DIC platform owners' privilege to engage in self-help remedies.[161] The actual harm requirement for trespass to chattels is

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158 *See supra* notes 36–38 and accompanying text.

159 *See* Cedar Point Nursery v. Hassid, 594 U.S.139, 155 (2021) ("But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. And no one disputes that the access regulation took that right from them." (citation omitted)).

160 The majority in *Rio All-Suites* stated that "the fact that *liability* for a trespass to personal property requires evidence of harm does not derogate from the owner's *right* to control the use of that property." Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 10 (Dec. 16, 2019) (quoting Purple Commc'ns, Inc., 361 NLRB 1050, 1073 n.43 (2014) (Miscimarra, Member, dissenting)). Such a "right" may or may not exist for purposes of the NLRA, but this "right" has no role in defining property interests in the constitutional sense for takings purposes. *See* Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. Econ. & Pol'y 69, 80–86 (2005) (distinguishing property owners' "rights" and "privileges" to engage in self-help enforcement of a right to exclude from their entitlements to causes of action such as trespass or nuisance); Merrill, *supra* note 121, at 13 n.2.

161 *See* Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 Tulsa L. Rev. 677, 683 (2009) (defining self-help as "a discretionary remedy" whereby a property owner can either (1) engage in self-help, taking advantage of their "privilege to do something that would otherwise be legally actionable in order to prevent or cure a legal wrong" or (2) "invoke legal remedies of damages . . . or injunction").

specifically justified by the existence and power of such a privilege.[162] This argument might assert that even if in a *Register-Guard* world the hypothetical worker could not be *sued* for exceeding her authorization, she could nonetheless be *disciplined or fired* for doing so, and therefore removing the employers' ability to regulate use of their systems by such means harms an underlying right to exclude. In turn, this right to exclude should support recognition of a property right susceptible to government takings under the Fifth Amendment, which is usurped by the *Purple Communications* rule.

This argument fails because the asserted privilege, almost imperceptibly affected by the modified *Purple Communications* rule, is a managerial right rather than distinctly a property right. Just as anti–*Purple Communications* arguments exaggerated the scope of worker conduct that the rules authorized,[163] this argument exaggerates the scope of employer conduct that the modified rule would prohibit. Under the modified *Purple Communications* rule, employers will lose almost no control over their platforms. At all times, they would retain discretion to determine who has access to these systems in the first place[164] and an unrestrained ability to monitor worker communications on these platforms.[165] On working time, they would retain a free hand to, ex ante, maintain policies forbidding nonwork communications[166]—including Section 7 conduct, when that prohibition is nondiscriminatory—or to prevent such communications via the infrastructure of the platforms themselves.[167] Ex post, employers could still respond to any worker conduct violating those lawful policies, including Section 7 conduct, with appropriate discipline in a nondiscriminatory manner.[168] In reality, the

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162 *See Hamidi*, 71 P.3d at 303 ("Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his *privilege to use reasonable force* to protect his possession *against even harmless interference*." (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (A.L.I. 1965))).

163 *See supra* notes 114–17 and accompanying text.

164 *See Purple Commc'ns*, 361 NLRB at 1063–64 ("Nor do we require an employer to grant employees access to its email system, where it has not chosen to do so.").

165 *See id.* at 1065 ("An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.").

166 *See id.* at 1054 (noting that workers "are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment *while on nonworking time*" (emphasis added)).

167 *See, e.g.*, *supra* notes 67–68 and accompanying text; LAWRENCE LESSIG, CODE 125 (Version 2.0 2006) ("The code or software or architecture or protocols . . . constrain some behavior by making other behavior possible or impossible. . . . In this sense, it too is regulation, just as the architectures of real-space codes are regulations.").

168 *See, e.g.*, *supra* notes 67–68 and accompanying text.

only effect the modified *Purple Communications* rule would have on employers' privilege to engage in self-help would be to rebuttably proscribe blanket rules on nonworking time. As Member Johnson himself acknowledged in his *Purple Communications* dissent, this slight harm is best characterized as harm to managerial prerogatives, rather than to anything properly characterized as a property right.[169] This is a far cry from the abrogation of trespass to real property seen in *Cedar Point*.[170]

The majorities in *Register-Guard* and *Rio All-Suites* made conclusory assertions of employers' supposed right to exclude their workers from engaging in Section 7 communications on their DIC systems and held that the *Purple Communications* rule impermissibly regulated that right.[171] But tested by reference to the relevant measuring sticks of such a right, this assertion bends and, with the help of the proposed modification to the *Purple Communications* rule, quickly breaks.

### *B. The Reach of the Rule Would Be Minimally Affected by Such a Modification*

In addition to the doctrinal advantage outlined above, the policy advantage of such an approach to insulating the rule from a takings challenge is that it retains the rule's reach. This is because the actual extent of worker conduct that would be excised from protection by such a modification would be incredibly limited.

Even in an unmodified future *Purple Communications* world, the extent to which workers choose to take advantage of their right to engage in Section 7 communications on employer-owned DIC platforms would remain limited by simple workplace dynamics. Namely, workers who use employer-owned DIC platforms are likely aware of the probability that any communications made on such platforms, Section 7–related or not, will be both technically and legally observable by their employer.[172] Often, employers make their ability to surveil such communications abundantly clear through their own policies shared with workers when they are given access to those systems, even if workers do not already

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169 *See Purple Commc'ns*, 361 NLRB at 1082 (Johnson, Member, dissenting).

170 *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 155–56 (2021).

171 *See* The Guard Publ'g Co. (Register-Guard), 351 NLRB 1110, 1114 (2007) (noting employer's "regulat[ion] and restrict[ion of] employee use of company property" is "a basic property right" (quoting Union Carbide Corp. v. NLRB, 714 F.2d 657, 663–64 (6th Cir. 1983))); Caesars Ent. (Rio All-Suites), 368 NLRB No. 143, slip op. at 1 (Dec. 16, 2019) (noting employers "indisputably ha[ve] a property right to restrict employee use of its equipment, including its IT resources").

172 *See* Kathryn Zickuhr, Wash. Ctr. for Equitable Growth, Workplace Surveillance Is Becoming the New Normal for U.S. Workers 10–11 (2021), https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-surv-report.pdf [https://perma.cc/5PHV-WAB9].

expect such surveillance as a matter of course.[173] Board precedent has repeatedly recognized that workers' Section 7 rights are "chilled" by knowledge or the impression that their employer will become aware of their involvement in union activity—even while declining to limit the employer's ability to do so in certain contexts.[174] Workers are smart enough to know that conducting union business on such platforms can be detrimental to their own interests and to the collective interests of their unions, so they will tend to refrain from doing so unless absolutely necessary.[175] This suggests that the volume of activity required to cause cognizable harm to any affected DIC systems—i.e., the precise conduct removed from the rule's protection—would already be exceedingly rare, thus limiting the costs of this proposed modification.

Still, even the highest conceivable volume of Section 7 communications is highly unlikely to overburden employer-owned DIC platforms, thanks to those platforms' increasing capacity to (1) host data and (2) moderate content—both at a continuously decreasing cost.[176] Cloud computing and other technological advancements have

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173 *See* Rebecca Heilweil, *Your Slack DMs Aren't as Private as You Think*, Vox (Apr. 2, 2021, at 11:04 ET), https://www.vox.com/recode/2020/1/24/21079275/slack-private-messages-privacy-law-enforcement-lawsuit [https://perma.cc/5Z6W-R9TM].

174 *Contrast* S.J.P.R., Inc., 306 NLRB 172, 172 (1992) (holding employer surveillance violated the NLRA because it "constituted more than ordinary or casual observation" and no attendant "safety or property" interest outweighed the workers' Section 7 rights), *with* Halo Lighting Div. of McGraw Edison Co., 259 NLRB 702, 716 (1981) (holding employer surveillance did not violate the Act because it curbed the "possibility of violence"). Research has confirmed the chilling effect of employers' anti-union conduct. *See generally* Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 Berkeley J. Emp. & Lab. L. 1, 50 (2020) (finding that workers' rights are chilled by polls of employees that are disguised efforts by the employer to determine the level of employee support for union drives and by employer use of hidden cameras to spy on union organizing efforts).

175 *See, e.g.*, NCRNC, LLC, 372 NLRB No. 35, slip op. at 8 (Dec. 16, 2022) (finding that observable dissipation of union activity was likely the result of "the chilling effect of being monitored[ because] employees are unlikely to willingly engage in open activity in front of their supervisors"); Hirsch, *supra* note 52, at 954 (noting that "monitoring" workers' Section 7 communications on employer-owned DIC platforms "can provide employers with information that is useful for legal attempts to thwart collective action, such as employees' goals and strategies"). *But see* Steven Perlberg, *Slack Is Fueling Media's Bottom-Up Revolution*, Digiday (July 15, 2020), https://digiday.com/media/how-slack-is-fueling-medias-bottom-up-revolution [https://perma.cc/25CM-YRJ8] ("[C]ommunicating on Slack offers staffers a degree of safety. It is so conspicuous that retaliation for organizing would be obvious . . . . 'Ironically, it becomes a protection.'").

176 *See* Samuel Olaoluwa Folorunsho, Olubunmi Adeolu Adenekan, Chinedu Ezeigweneme, Ike Chidiebere Somadina & Patrick Azuka Okeleke, *Revolutionizing Telecommunications with Cloud Computing: Scalable and Flexible Solutions for the Future*, 7 Int'l J. Frontiers Eng'g & Tech. Rsch. 53, 65 (2024), https://frontiersrj.com/journals/ijfetr/sites/default/files/IJFETR-2024-0040.pdf [https://perma.cc/W5WC-M8K5]; Mehtab Khan, *Framing Online Speech Governance as an Algorithmic Accountability Issue*, 99 Ind. L.J. 37, 42 (2023) (discussing increasing scalability of algorithmic content moderation tools); Alexander Hertel-Fernandez, Wash. Ctr. for Equitable Growth, Estimating the Prevalence of Automated Management and Surveillance

made it significantly easier for DIC platforms to move larger and larger quantities of data between users without breakdowns.[177] At the same time, increasingly scalable automated-surveillance and content-moderation capacities make it more feasible to police the "[w]orking time is for work" edict.[178] This increased capacity makes it highly unlikely that any worker conduct authorized under the modified *Purple Communications* rule would ever reach the point where the harm exception outlined above would actually be triggered.

## Conclusion

This Note has sought to pose a solution to a problem facing labor regulators interested in expanding workers' access to the very communications systems that they already use in their day-to-day work. Use of these systems can dramatically aid workers in their collective struggles for workplace democracy, from the initial organizing stage through contract bargaining and beyond. But employers that feel threatened by the potential of such use are poised to squash regulators' efforts by way of the Fifth Amendment, claiming a broad property right that wildly inflates the actual impact of such expanded access. Regulators can insulate this newfound workers' right from employers' takings attacks by clarifying the true contours of the conduct it authorizes and thereby emphasizing the realities of the technology at issue. All of this can be done at little cost to the original intent and reach of the rule. In an increasingly digital workplace, updated regulation is vital. This proposal allows the Board to act decisively.

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Technologies at Work and Their Impact on Workers' Well-Being 4 (2024), https://equitablegrowth.org/wp-content/uploads/2024/10/workplace-surveillance-report50.pdf [https://perma.cc/T45W-UDT3].

177 *See* Folorunsho et al., *supra* note 176, at 65.

178 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945); *see also* Khan, *supra* note 176, at 42 (discussing increasing scalability of algorithmic content moderation tools); Hertel-Fernandez, *supra* note 176, at 4 (discussing concerns about increased data collection through employer DIC systems).